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DEMYSTIFYING THE IDEA OF INTANGIBLE CULTURAL HERITAGE THROUGH THE LENS OF HUMAN RIGHTS

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ABSTRACT

The relationship between human rights and cultural heritage law is critical, but it has received insufficient attention in the literature, particularly among human rights experts. Cultural heritage has several elements and characteristics that have strong human rights dimensions (both positive and negative), including its role in cultural identity formation and affirmation, its relationship to the thorny notion of cultural diversity, the problem of cultural traditions or practices that flout human rights standards, and the potential of heritage to exclude and serve as the vehicle for expressing social and political tensions. The paper sketches out a trend to broaden the understanding of certain basic aspects of human rights, as well as some theoretical issues that cultural heritage raises, such as relativist perspectives and claims for collective rights. Cultural rights, while vital, are not the only human rights that apply to cultural heritage protection, and an attempt is made to assess the substance and effectiveness of existing intangible cultural heritage instruments in light of other relevant human rights. Although recent cultural heritage legislation has responded more to human rights demands, the soft law nature of the legislation and the strong reservation of State sovereignty are limiting factors; thus, at stake is the question, if human rights are well understood and applied, can they have a direct impact on intangible cultural heritage protection and who should control stewardship and the benefits of intangible cultural heritage.

INTRODUCTION

Intangible Cultural Heritage (hereinafter referred to as "ICH") is a critical component in sustaining and preserving a diverse culture, particularly in the age of

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globalisation.[2] The knowledge and assimilation of intangible cultural heritage of various community helps in understanding each other's way of life and enhances mutual respect for each other. Its relevance stems from the premise that this is not only a form of cultural expression, but it also contributes to long-term development by disseminating a wealth of information and skill to descendants.[3] ICH is traditional and contemporary life at the identical period, that implies it comprises age-old customs passed down through generations that are in accordance with current practises of urban and rural communities representing many cultures.[4] It provides for the principle of inclusivity as people share expression of their heritage which are similar to the practices of different cultural entities. These have indeed been transmitted down to the next generation, have evolved in reaction to their surroundings, and assist to our feeling of identification and perpetuity by acting as a bridge between the past, the current, and the future.[5] It contributes to social structure, encouraging a sense of identity and accountability which helps individuals to feel part of one or different communities and to feel part of society at large. [6] It is not simply regarded as an ethnic pleasure to make the comparison solely on the grounds of exclusivity.[7]

The finest meaning of ICH is enclosed in the *2003 UNESCO Convention on Intangible Cultural Heritage* which explains it in a way comprehensive enough to embrace various know-hows and jargons across the world such as the practises, expositions, phrase, insights, expertise and the processes, relics and works of art connected therewith – that societies, organisations as well as, in certain situations, individual

[2] Aruushi Gupta and Prathama RK, *Analysis of Heritage Management in India and its Impact on Stakeholders* http://ijpsl.in/wp-content/uploads/2021/06/Analysis-of-Heritage-Management-in-India-and-Its-Impact-on-Stakeholders_Aruushi-Gupta-Prathama-RK.pdf., accessed on November 03, 2021.

[3]Janaina Mello, *Intangible Cultural Heritage, India and Yoga* https://www.researchgate.net,publication/326688953_Intangible_Cultural_Heritage_India_and_Yoga, accessed on November 03, 2021.

[4]Arun Kapur, *Importance of tangible and intangible heritage of the core area of Chowk*, Lucknow https://iopscience.iop.org/article/10.1088/1755-1315/402/1/012006/pdf., accessed on November 03, 2021.

[5] *What is Intangible Cultural Heritage?* https://ich.unesco.org/en/what-is-intangible-heritage-00003, accessed on November 03, 2021.

[6]Patricia Ann Hardwick, *Intangible Cultural Heritage in Asia Traditions in Transition* https://asianethnology.org/downloads/ae/pdf/AsianEthnology-2252.pdf., accessed on November 03, 2021.

[7]Livinus Kindo, *Museum and Intangible Heritage* OHRJ, Vol. XLVII, No. 1 http://magazines.odisha.gov.in/Journal/jounalvol1/pdf/ojrj-1.pdf., accessed on November 03, 2021.

people recognised as an integral component of cultural heritage.[8] Heritage is usually accepted to encompass monuments or collecting valuable items, howbeit that also incorporates folk tales, creative art forms, traditional and ethnic carnivals, and local handicrafts that are passed down through our families.[9] This ICH, by its very nature, is fragile and necessities safe and thoughtful adherence in the facade of rising globalisation of human rights culture. [10]

Accordingly, the paper is divided into four sections. The first section will discuss the national and international laws acknowledging the importance and concept of intangible cultural heritage. Next it would be argued that how intangible cultural heritage is intertwined with human rights. Further, certain intangible cultural heritage in the form of age-old customs will be analyzed through the lens of human rights and constitutionalism. Lastly, a robust mechanism will be suggested which is a fitting paradigm to tackle a lot of the cynicism that surrounds while practicing seemingly liberal and humanitarian intangible cultural heritage.

INTANGIBLE CULTURAL HERITAGE: A BLEND OF DOMESTIC AND INTERNATIONAL LAWS

For its importance as a cornerstone of mankind's civilization, provisions relating to intangible cultural heritage have been incorporated in public international law, necessitating legitimate preservation not merely at the domestic, but likewise at the international arena.

Domestic Law

India is known for its rich heritage and culture; the culture, languages, dialects make it Incredible India. The Indian Constitution's founding fathers decided to make it mandatory for both the government as well as each citizen of India to

[8] Bhaswati Mukherjee, India's Intangible Cultural Heritage: A Civilisational Legacy To The World https://www.cgihamburg.gov.in/pdf/2015_07_INDIA_S_INTANGIBLE_CULTURAL_HERITAGE_A_CIVILISATIONAL_LEGACY_TO_THE_WORLD.pdf., accessed on November 03, 2021.
[9] *Supra* Note 1.
[10] *What is Cultural Heritage*, http://www.cultureindevelopment.nl/cultural_heritage/what_is_cultural_heritage, accessed on November 03, 2021.

conserve and safeguard their cultural history, as Article 29[11] of the Constitution, which is a fundamental right, grants every segment of citizen who reside in Indian territory the right to preserve their own language, script, and culture. By virtue of Article 51A (f)[12] of the Constitution, citizens are also obligated to cherish and conserve the legacy.

In 2019, a bill was proposed in Lok Sabha titled *The Promotion and Protection of Intangible Cultural Heritage Bill, 2019*. In the bill, ICH has been referred to as local based traditions, customs, and representations and articulation such as understanding, proficiency and cultural heritage of community or individuals.[13] The board shall undertake to perform these functions- conducting a survey every year for preparing a list representing intangible cultural heritage of India. To save documentary records of local traditions and to conserve them using the finest ways available. Additionally, it is the obligation of the board to identify, safeguard and uphold the enriched, diverse and enormous incorporeal cultural heritage of the country, constituting a Management Committee comprising of a chairperson and at least five other members, on behalf of various cultural traditions to create consciousness in the direction of and assimilation of intangible cultural heritage of the country. Furthermore, the proposed legislation has incorporated the clause which deals with establishment of a board known as *Alha Board* which would undertake the work of protecting and conserving the intangible cultural heritage. It is proposed that the board will consist of twenty-five to be appointed by sovereign at the centre and out of these, two members shall be representatives of the cultural organizations.[14]

International Law

[11] Protection of interests of minorities (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
[12] Article 51A (f) to value and preserve the rich heritage of our composite culture.
[13] Shri Kunwar Pushpendra Singh Chandel, MP, *The Promotion and Protection of intangible Cultural Heritage Bill, 2019* http://164.100.47.4/billstexts/lsbilltexts/asintroduced/304LS%20As%20Int....pdf., accessed on November 03, 2021.
[14] *Supra* Note 11.

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The United Nations Educational, Scientific, and Cultural Organization (hereafter referred to as UNESCO) is renownedly known for its functioning in the arena of cultural and historical preservation.[15] Ever since its inception, the organisation has propelled global cooperation and teamwork in the domain of cultural heritage, primarily predicated on the assumption that nations must preserve and safeguard cultural heritage due to its importance to humanity and as a source of international collaboration, nurturing cooperative relationship and deterring global disputes.[16] Nations who are part of UNESCO have endorsed three Cultural Heritage Conventions: *The Convention concerning the Protection of the World Cultural and Natural Heritage* (1972);[17] *the Convention on the Protection of the Underwater Cultural Heritage* (2001)[18] *and the Convention on the Safeguarding of the Intangible Cultural Heritage* (2003).[19] These accords define the several forms of cultural heritage and are intended to protect cultural heritage at regional and global scale. The overwhelming backing for the *World Cultural and Natural Heritage Convention* and the *Intangible Heritage Convention*, specifically, demonstrates that nations across the globe recognise the significance of cultural heritage preservation and development.[20] These UNESCO Heritage Conventions demonstrate a transition from the shielding of traditional knowledge for the wider populace, with an increasing focus on national sovereignty and entitlements (Convention on World Cultural and Natural Heritage and Convention on Underwater Cultural Heritage) to the preservation of cultural identity of specific societies, encompassing people in the procedure of recognition and proclamation (Convention on Intangible Cultural Heritage).

It has long been recognised that formless or ethereal parts of cultural legacy, nominally intangible cultural assets, make up a significant portion of national

[15] *Protecting Our Heritage and Fostering Creativity,* UNESCO https://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity (Sept. 12, 2021).
[16] *UNESCO in Brief – Mission and Mandate,* UNESCO https://en.unesco.org/about-us/introducing-unesco (Sept. 12, 2021).
[17] *The Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16th session, Paris, Nov. 16, 1972.
[18] *The Convention on the Protection of the Underwater Cultural Heritage,* 31st session, Paris, Nov. 2, 2001.
[19] *The Convention on the Safeguarding of the Intangible Cultural Heritage,* 32nd session, Paris, Oct. 17, 2003.
[20] Yvonne Donders, *Cultural Heritage and Human Rights,* in *The Oxford Handbook of International Cultural Heritage Law* 170 (F. Francioni and A. Vrdoljak, ed., OUP 2019).

history. As per *Article 2(1) of the Convention on Intangible Cultural Heritage*, ICH is defined as: the behaviours, appearances, sentiments, beliefs, and abilities that communities, organisations, and, in certain instances, individuals acknowledge as an essential component of their cultural heritage, or even the devices, items, relics, and cultural places linked with them.[21] Surprisingly, this definition emphasises the desire of factions and individuals instead of merely the strength and desire of nations, acknowledging that people are the ones who create and maintain cultural legacy. Regardless of this, it is pertinent to emphasise that nations have complete control over the capacity to define and legally recognise cultural assets.

A strong correlation connecting ICH as well as the cultural identity is recognised in the *Convention on Intangible Cultural Heritage*. Article 2(1) of the convention asserts that the individuals of the social organization perpetually construct intangible cultural legacy in reaction to their surroundings, their relationship with environment, and their heritage, and this gives them with a feeling of recognition and permanence.[22]

Languages are frequently considered as an element of intangible cultural heritage, specifically local or ethnic dialects. Dialects play an indispensable part in the manifestation as well as transfer of cultural legacy, according to the *Convention on Intangible Cultural Heritage*. Article 2 (2) (a) affirms that dialect is a pathway for ICH that is critical to persons' and groups' identities.[23] The majority of intangible cultural heritage genres rely on language for habitual practise. Language is not just a conveyance in the realm of folk tales and emotions; it is the fundamental core of them. As a result, actions in the realm of dialects are required to promote and conserve ethnic identity.

Furthermore, the 1989 *UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore*[24] revealed a strong correlation with both cultural heritage and

[21] *Supra* 18 at art. 2, ¶ 1.
[22] *Ibid.*
[23] *Supra* 18 at art. 2, ¶ 2 (a).
[24] *The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore,* 25th session, Paris, Nov. 15, 1989.

cultural identity. It provides a detailed outline about the *folklores* that is intrinsically related to intangible cultural heritage and accentuates its connection to cultural identity.

PARADIGM APPROACH: HUMAN RIGHTS APPROACH TO INTANGIBLE CULTURAL HERITAGE

Intangible Cultural heritage is sometimes a great attribute for ethnic groups to help bolster their ethnic heritage, yet it equally entails pejorative connotations. Intangible cultural heritage can indeed portray mankind's sinister half.[25] Human rights serve a pivotal role here as well, this moment as a guard against traditional or customary practises associated with cultural heritage that adversely affect persons or society. The *Universal Declaration on Cultural Diversity* and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* both states unequivocally that cultural values or heterogeneity must not be suffused to undermine human rights or to restrict freedom of expression.[26]

On the similar lines, the *Convention on Intangible Cultural Heritage* outlines intangible cultural heritage to encompass "social activities and rituals." As a natural outcome of these institutional standards, specific part of the population, such as women, may be mistreated, prejudiced, or abused. As a result, article 2(1) states that only intangible cultural practices that are consistent with contemporary worldwide civil rights accords will be considered.[27] As a corollary, the *UN Convention on the Elimination of All Forms of Discrimination Against Women (1979)*[28] assigns a cementitious responsibility on nations to customise the sociocultural trends of behaviour of males

[25] Farida Shaheed, *Report of the Independent Expert in the Field of Cultural Rights,* ¶ 8, A/HRC/14/36 (March 22, 2010).
[26] *UNESCO Declaration on Cultural Diversity'* (Nov. 2, 2001) art 4; *Convention on the Promotion and Protection of the Diversity of Cultural Expressions* (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311, art 2(1).
[27] *Supra* 20.
[28] *The Convention on the Elimination of All Forms of Discrimination against Women,* Res. 34/180, New York, Sept. 3, 1981.

and females for eradicating bigoted customs and such practises that are premised on the notion of the humiliation or dominance or prejudicial role of either sexes.[29]

Modifications in cultural practises are clearly more fruitful when they emerge from inside the traditional setting rather than being dictated from outside. This doesn't really, absolve nations of their responsibility to devise strategies to foster such transformations. As per Article 34 of the *United Nations Declaration on the Rights of Indigenous Peoples*[30], indigenous peoples have the right to propagate, cherish and guard their traditions, beliefs, rituals, protocols, practises, and legal frameworks or norms, in consonance with pre-defined Human Rights ideals.[31] In addition to this, according to Article 4 of the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities,*[32] individuals shall be entitled to cultivate and exhibit their history, rituals, and practices, save when specific activities are in defiance of domestic law and opposed to international norms.[33]

The *Committee on Economic, Social and Cultural Rights*[34] also recommended that nations must take steps to address systemic prejudicial behaviours and to eradicate all types of bigotry directed at groups premised on their distinct ethnic identity. Moreover, the Committee observed that noteworthy aspect of the right to join in cultural activity is that everybody has the freedom to partake in their very own traditions while upholding human rights. It specifically cites the liberty of conscience, opinion, faith and the right to use one's preferred dialect.[35]

Because intangible cultural traditions are so different, it is extremely difficult to offer broad comments about whether they are tolerable from the standpoint of social

[29] *Id* at art 5 ¶ (a).
[30] *The United Nations Declaration on the Rights of Indigenous Peoples,* Res. A/RES/61/295, Sept. 13, 2007.
[31] *Id* at art 34.
[32] *The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities,* GA Res. 47/135, Dec. 18, 1992.
[33] *Id* at art 4.
[34] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/21, 21 December 2009.
[35] *Id* at ¶ 52.

justice. The extent of their potential confrontation with these inalienable rights is ruled by the facts of the situation. Traditional norms that are demonstrably in violation of human integrity cannot be defended on the basis of intangible cultural (heritage) rights.

HOW MUCH (LAW)GICAL ARE INTANGIBLE CULTURAL HERITAGE?

When it comes to ethnic plurality and legacy (especially intangible), human rights are frequently invoked. Unfortunately, certain measures to safeguard intangible cultural assets, ironically, pose a menace to certain fundamental rights.[36] Many people assert that following an age-old legacy is a basic right, although many argue that it is distinctly in violation of human rights norms as well as accords. Some manifestations of historical legacy are incompatible with a person's liberty to select his or her own road.[37] The saddest part is that certain traditional practices and beliefs widely espoused by certain spiritual or cultural communities infringe upon basic innate rights and fundamental liberties of those who are less privileged elements of civilization, notably females and kids, undocumented migrants, as well as the underprivileged. Fertility cults, circumcision, forced marriages, and gender-based regulations to veil the upper torso in specific manner are all instances of cases in point. Many have been discarded or are on the verge of being discarded, while others are yet thriving but also flourishing.[38]

Sati System: Murderous Ritual versus Devotional Custom

In the old days, Hindu communities' widows have encountered appalling situations in every way. After the demise of her spouse, it was customary for a widow to shave her head and dress in white attire. She was forbidden from remarrying or wearing

[36] Monica Palmero Fernandez, *Towards a Human Rights Approach to Cultural Heritage Protection* https://www.heritageinwar.com/single-post/2019/07/02/towards-a-human-rights-approach-to-cultural-heritage-protection, accessed on November 03, 2021.
[37] DEAN B. SUAGEE, *Human Rights and the Cultural Heritage of Indian Tribes in the United States,* 8 INT. J. CULT. PROP. 48, 50 (1999).
[38] William Logan, *Cultural Diversity, cultural heritage and human rights: towards heritage management as human rights based cultural practice,* INT. J. HERIT.STUD 1, 11 (2012).

any gold jewellery. An even harsher and barbaric ritual was for a Hindu widow to sacrifice herself in her husband's funeral pyre as an act of *Sati*.[39]

The tradition of widows being immolated on their husbands' funeral pyre, known as Sati, has always been at the heart of discussion over the depiction of the East in Western literature. Aside from the fact the significant number of occasions of *Sati* can indeed be mapped in records by Britishers, many of whom were available at these incidences to thwart or discourage would-be satis. [40] Albeit the Anti-sati law was passed in 1829[41], the immolation of Roop Kanwar, a Rajput widow, in the state of Rajasthan in 1987 sparked a resurrection of attention in the tradition of sati in late-twentieth-century India.[42] While these occurrences merely serve to corroborate the West's and even Indian feminists' perceptions of sati as a common homicidal practice that is still tolerated in Indian culture, elements of the East and/or conformist Hindu values, on the other hand, defend the idea that sati is an audacious cult of "wifehood dedication," wherein widow "voluntarily" seek to make herself sati without any spiritual or societal compulsion being applied.[43]

The *Jauhar* is an apparently identical ancient tradition. Despite their traditional significance in the midst of *Rajputs*, there continue to be substantial disparities amid them. Whilst *Sati* was an instance of self-immolation carried out by an individual, *Jauhar* seems more like a communal or mass suicide. Furthermore, whereas *Sati* can be conducted by any upper-caste woman, Jauhar was committed by the royal family as a means of escaping the brutality of invaders.[44]

Unfortunately, traditional and religious notions are used to justify as well as laud wife's freedom to suicide. What is defended in the guise of traditional believes is a

[39] Anand A. Yang, *Whose Sati?: Widow burning in early 19th century,* 1 J. WOMEN'S HIST. 8, 10 (1989).
[40] Andrea Major, *A Question of Rites? Perspectives on the Colonial Encounter,* 4 HIST. COMPASS 780, 789 (2006).
[41] The Bengal Sati Regulation Act, 1829, No. 17, Regulation of Bengal, 1829 (India).
[42] T.K. Rajalakshmi, *Sati and the Verdict,* FRONTLINE (March 12, 2004), https://frontline.thehindu.com/other/article30221385.ece., accessed on November 03, 2021.
[43] Paul B. Courtright, *The iconographies of Sati,* in *Sati: The Blessing and the Curse* 30 (John Stratton Hawley, New York: Oxford University Press 1994)
[44] M. Shamsudiin, *A Brief Historical Background of Sati Tradition in India*, 3 DIN VE FELSEFE ARAŞTIRMALARI 44, 46 (2020).

heinous deed. Especially in circumstances where *Sati* is regarded as a comportment of own desire, it is vital to comprehend why certain females prefer to endure this torment. It is not just because they want to be reunited with their spouses after death; it is also to avoid the cruelty they could face as a widow if they're still living.[45] Sati's ideologies have an overtly patriarchal and masculine tone to them.[46] The female divinity analogy and the iconography of the perfect wife employed to recount these acts have ramifications that go past the conduct. Choice and compulsion are two more concepts that must be comprehended within the paradigm of broader frameworks of societal and theological oppressions to which these females have been enslaved to their whole lives.[47]

Female Genital Mutilation: An Inhumane Practice Ensuring the "Pride" of Community

Those treatments that include half or whole ablation of the outer female genitalia, or other harm to the women's external genitalia for non-medical considerations are classified as female genital mutilation. Conventional circumcisers, who typically serve other important responsibilities in societies, such as monitoring childbirths, are the people who execute the majority of the circumcisions.[48] For decades, the *Dawoodi Bohra society* has practised this secret female circumcision ceremony, with an absolutely zero societal discourse of its horrifying ramifications.[49] Female genital mutilation is decided to carry out due to myriad of purposes that differ by place as well as period, and involve a combination of sociocultural variables within households and cultural groups. One of most prevalent explanations given are: a) it

[45] Nandini Bhattacharyya-Panda, *Women in the Śāstric tradition: Colonialism, law, and violence,* in *The Blackwell Companion to Religion and Violence* 390 (Andrew R. Murphy ed., Oxford: Wiley-Blackwell, 2011).
[46] Dorothy Stein, Burning *widows, burning brides: The perils of daughterhood in India* 61 PAC. AFF. 465, 470 (1988).
[47] Ania Loomba, *Dead women tell no tales: Issues of female subjectivity, subaltern agency and tradition in colonial and post-colonial writings on widow immolation in India* 36 HIST. WORKSHOP J. 209, 220 (1993).
[48] *Female Genital Mutilation,* WHO https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed on November 03, 2021.
[49] Lawyers Collective Women's Rights Initiative (LCWRI), Female Genital Mutilation: Guide to Eliminating the FGM Practice in India 7 (2012).

is a theological observance, b) it is a custom, and c) it is meant to keep a female child's libido (sexuality) in check.[50]

Female genital mutilation is regarded as an infringement of girls' and women's human rights across the globe. It exemplifies deep-seated gender inequality as well as severe case of bigotry against females which is in violation of Article 1 of the *Convention on the Elimination of All Forms of Discrimination Against Women*[51] and Article 2 of the *Universal Declaration of Human Rights*[52], both of which expressly state that women possess the prerogative to be completely independent of all kinds of discrimination. As this inhumane practice disproportionately impacts girls as young as eighteen, the problem at hand significantly contradicts the norms dealing with the safety of children's rights stated in the *Convention on the Rights of the Child*[53]. The practise also infringes on a woman's right to wellbeing, safety, and inviolability, as well as her legal claim to be freed from torment and harsh, abhorrent, or inhumane treatment, and her right to life when the operation leads to demise, thereby non fulfilment of the commitment towards the international instruments like *International Covenant on Civil and Political Rights*[54] and *General Assembly Resolutions and Secretary General Reports on Traditional or Customary Practices Affecting the Health of Women and Girls*.[55]

When all is said and done, no justification can legitimize removing a girl's genitals, regardless how "minimal" the surgery is. Nobody has the authority to limit or regulate a female's sexual inclinations, or to instruct her she must stay pure. These are male chauvinist beliefs that don't belong in modern situation. Even when one believes that genital mutilation is the route to achieving "spiritual" or "religious" purity, one must be cognizant of the certitude that sanctity is found not in one's genitals, but in one's attitudes as well as actions.

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[50] *Supra* 47.
[51] *Supra* 27 at art 1.
[52] *The Universal Declaration of Human Rights,* GA Res A/RES/217(III), Paris, Dec. 10, 1948, art 2.
[53] *The Convention on the Rights of the Child,* GA Res 44/25, Sept. 2, 1990, art 19.
[54] *The International Covenant on Civil and Political Rights,* GA Res 2200A (XXI), March 23, 1976, art 9 ¶ 1.
[55] *General Assembly Resolutions and Secretary General Reports on Traditional or Customary Practices Affecting the Health of Women and Girls,* A/RES/53/354, Sept. 10, 1998, ¶ 17-18.

Triple Talaq: A Blatant Infraction of Human Rights

Human rights are commonly associated with more liberty and advancement. It is worthy of mention, regrettably, that granting liberty doesn't quite automatically imply liberation. The ubiquitous concept on which human rights are premised is a fundamental cause for their exclusive aspect. The gloomy facet of cardinal rights is most visibly manifested in the issues of females, who are trapped at the crossroads of civic pride and contemporary ideology.[56] The scenario of a severely oppressed Muslim woman who need assistance through the liberal rights rhetoric is one such humanistic issue. The *Shayara Bano v. Union of India*[57] is at the forefront of the ongoing argument about triple talaq.

Triple talaq, also known as *talaq-ul-biddat* or *talaq-ul-bain,* is a kind of talaq that is only practised by the Hanafi School. Such talaq is not approved or recognised by the Shias and Mallikis. This sort of talaq allows the man to announce three divorce declarations during any moment sans taking into account the stance of the wife, and the terrible aspect is that this form of talaq is irrevocable.[58] While analysing the contours of universally recognised inalienable privileges and the golden thread of Indian Constitution the five-judge bench of the Hon'ble Supreme Court in *Shayara Bano v. Union of India* comprising of Justice Nariman, Justice UU Lalit, Justice Kurian Joseph, former Chief Justice of India JS Kehar and Justice Abdul Nazeer with a majority of 3:2 declared *talaq-ul-biddat* as unconstitutional as it is violative of Article(s) 14, 15, 21 and 25 of the Indian Constitution.

In the aforementioned case, it was found that the rights of the wife in a marriage bond among Muslims had manifested considerable sexual inequality, as the practise of *talaq-ul-biddat* provided a husband an unconditional right to dissolve the married tie in which the wife seemed to have no voice in the issue, inasmuch as it may be announced in the absence of the female spouse, and even sans the woman's consent,

[56] Avantika Tiwari, *Triple Talaq- Counter Perspective with Specific Reference to Shayara Bano,* 1 ILI Law Review 86 (2017).
[57] Shayara Bano v. Union of India (2017) 9 SCC 1.
[58] Mulla, Principles of Mahomaden Law 450 (Lexis Nexis, 22nd ed. 2017).

insofar as it might. Evidently, in violation of equality and anti-discrimination clause of the Indian Constitution. As a result, Muslim women have suffered a tremendous deal of injustice. Into the bargain, the court cited the *Charu Khurana v. UOI*[59] and *Valsamma Paul v. Cochin University*[60], in which it was unequivocally stated that gender justice is the nurtured accomplishment of inherent human rights, and that prejudice purely on the basis of sexual identity is not permissible.

Aside from constitutional laws, the reference was made to a number of international conventions and covenants, including the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Universal Declaration of Human Rights*, which attempted to link human rights to customary practises.[61]

Despite this progressive ruling, the so-called stakeholders in society have been vocal in their opposition to the ruling. When challenged with social conventions, women's rights typically take a back seat whenever a step towards women emancipation is taken.

Sabarimala Issue: A Discourse on Civilized Form of Untouchability

Legal scheme supports the essence of constitutionalism and oftentimes replenish substantive deficiencies inadvertently remain unresolved by the legislative or are creatures created out of upheavals in contemporary advanced, secular and democratic nation. Unfortunately, in a nation as deeply devoted to sacred dogmas as India, the certitude that judiciary adjudicate on spiritual aspects has historically been a matter of friction. These legal difficulties in India include a complicated dynamic interaction amongst Article(s) 14, 25, and 26 of the Constitution. Whenever aforementioned Articles are brought together, we are overwhelmed by the extensive discourse which springs up as we contemplate the principles of constitutional integrity. In the case of *Indian Young Lawyers' Association v. State of Kerala,*[62] a five-judge bench of the Hon'ble Supreme Court, comprised of former Chief Justice of

[59] Charu Khurana v. UOI (2015) 1 SCC 192.
[60] Valsamma Paul v. Cochin University (1996) 3 SCC 545.
[61] *Supra* 56 at ¶ 192.
[62] Indian Young Lawyers' Association v. State of Kerala (2019) 11 SCC 1.

India Deepak Mishra, Justice Nariman, Justice D Y Chandrachud, and Justice Malhotra, confronted a paradoxical customary practise wherein a restriction was imposed on the admittance of women of menstruation age (between 10 and 30 years of age) into the *Sabarimala Shree Dharma Sastha* Temple which is dedicated to *Lord Ayyappa*.

The Sabarimala decision lubricated the gears of social integration and gave feminist doctrine new life. The temple's practise of banning women was ruled unlawful by a 4:1 vote. Dipak Misra, the former Chief Justice of India, stated that spirituality is a part of living inextricably related to a person's self-respect, and paternalistic practises premised on the marginalisation of one sex in lieu of someone else cannot be legally permitted to intrude on the underlying liberty to practise and espouse one's spirituality.[63] Furthermore, Justice Chandrachud acknowledged that biological attributes of females, such as menstruation, have really no influence on the constitutional rights given to them. A woman's menstrual condition cannot be a solid legal ground for depriving someone of self-respect, as well as the shame associated with it has no validity in a constitutional order. In addition, Justice Chandrachud stated that the marginalisation was a manifestation of untouchability and female ostracization that violated fundamental and innate human rights.[64]

To cut a long tale short, a conservative construction of the Holy book shouldn't be employed to justify biased perspective that focuses on an individual's biological condition. Females should not be subjected to societal discrimination based primarily on conceptions of immaculateness and squalor. The goal of this case was to get a judiciary to step in and limit fanatical acts in the guise of religious belief. Human rights do not entail barring females' entrance to venues of religious prayer purely because of their biological condition and yet these cardinal privileges came to the fore as an escutcheon to protect against the bigoted customary practices.

INTANGIBLE CULTURAL HERITAGE: CRITICAL ASSESSMENT

[63] *Id* at ¶ 106, 110 and 144.5.
[64] *Supra* 61 ¶ 341, 342 and 357.

Unlike tangible heritage, ICH is, by its own nature, of a markedly dynamic nature. This nature actually represents the two sides of a coin. On the one hand, it allows ICH persistently to recreate itself in order constantly to reflect the cultural identity of its creators and holders. In fact, such a heritage has the intrinsic capacity to modify and shape its own characteristics in parallel to the cultural evolution of the communities concerned, and is therefore capable of representing their living heritage at any moment.[65] On the other hand, this inherent flexibility – or, in other words, the 'ephemeral' character of ICH – makes it particularly vulnerable to being absorbed by the stereotyped cultural models prevailing at any given time. In an age when globalization is virtually uncontrolled, such characterization puts the very identity of peoples in peril of being curtailed and absorbed by the dominant society following dogmatic customs. In consideration of the fact that cultural identity is inextricably linked to the safeguarding of ICH and to its transmission to future generations, modern society, with its typical models and customs, may need a robust mechanism which can ensure preservation of original humanitarian customs which are not overshadowed by hackneyed stereotypical principles.[66]

SUGGESTIONS: STRENGTHENING THE ROLE OF COMMUNITIES IN SAFEGUARDING AND BALANCING THE INTANGIBLE CULTURAL HERITAGE AND HUMAN RIGHTS

Intangible Cultural Heritage is reliant on those whose understanding of rituals, crafts, and practises is transmitted down through the ages or from one cultural group to another.[67] Additional aspect strengthening and reinforcing the relationship between ICH and social justice appears to be significant role of communities in the identification, advancement, and management of ethnic heritage. Paying particular attention to the *Intangible Cultural Heritage Convention*, Nations must recognize as well as describe intangible cultural heritage components with the

[65] Federico Lenzerini, "Intangible Cultural Heritage: The Living Culture of Peoples", *European Journal of International Law*, 22 (1), 101, 115 (2011).
[66] *Id.*
[67] *Supra* 19.

assistance of individuals, factions, and appropriate non-governmental entities. Besides this Article 15 of the Convention vehemently asserts that each nation must strive to secure the greatest feasible engagement of organizations, and, wherever necessary, persons who produce, preserve, and disseminate such heritage in the context of its protection actions of intangible cultural heritage, and to engage them constructively in its administration.[68]

Because these cultural norms are passed down to future generations, it is important to pass on only those rites and behaviours that are ethically correct and do not degrade either gender. As a result, educating community members about concepts that assert a balance between customs and human rights can go a long way toward preventing disputes between two intrinsic ideals that are intertwined as a double helix. For accomplishing this end a reference can be made to Article 27 of the *Convention on World Cultural and Natural Heritage* which specifically stipulates, nations should undertake teaching initiatives to promote folk's admiration for cultural heritage.[69] The *Convention on Intangible Cultural Heritage* is considerably comprehensive, and it incorporates unique provisions for local groups. Article 14 specifies that nations shall undertake educative, instructional as well as awareness-raising programmes with(in) groups to ensure that intangible cultural heritage is recognised, respected, and enhanced in societal structure.[70]

CONCLUDING REMARKS

Since ages only tangible heritage was considered as valuable so to as to be preserved and protected but with changing dynamics of human lives, understanding of ICH is acquiring momentum. ICH has an element of human rights attached with it which often gets flouted leading to societal and political consequences. At the international front, UNESCO is the bellwether for recognizing, developing and ensuring the sustainability of intangible cultural heritage to keep them alive for the generations to come to appreciate them and enhance their value by promoting them. In India, at

[68] *Supra* 18 at art 15.
[69] *Supra* 16 at art 27.
[70] *Supra* 18 at art 14.

present there is no legislation to protect these rights but the judicial organ of the government has time and again discarded the practices which were against the human rights and recognised the heritage and rights which deserved the attention of the system and its citizen and our nation as a whole.

No doubt ICH can play a positive role in acknowledging cultural identity. However, it has certain negative connotations attached with it. ICH may reflect the darker side of the humanity. In this sense, human rights again play an important role, this time as a shield against cultural or traditional practices related to cultural heritage that are harmful for individuals or communities.

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